



August 14, 2001

Mr. Charles Buenger  
Buenger & Associates  
3203 Robinson Drive  
Waco, Texas 76706

OR2001-3565

Dear Mr. Buenger:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150736.

The City of Hewitt (the "city"), which you represent, received two requests for reports, photographs, and other information relating to an automobile accident. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first note that some of the requested information comes within the scope of section 552.022 of the Government Code. Section 552.022(a) provides that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1) (emphasis added). Section 552.022(a)(1) requires the release of the responsive incident report, unless the report contains information that is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception is not other law that makes information confidential for the purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body). Thus, the city may not withhold the incident report under section 552.103.

We note that the report contains Texas driver's license and license plate numbers. Section 552.130 excepts from public disclosure information that relates to

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [and]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). Section 552.130 excepts Texas driver's license and license plate numbers from public disclosure. We also note, however, that the first requestor is an attorney for the private individual whose driver's license and license plate numbers appear in the incident report. The first requestor therefore has a special right of access to his client's driver's license and license plate information under section 552.023 of the Government Code.<sup>1</sup> Information to which the first requestor has a special right of access under section 552.023 may not be withheld from him under section 552.130. With this exception, the Texas driver's license and license plate numbers that appear in the incident report must be withheld from the requestors under section 552.130. The rest of the incident report must be released under section 552.022(a)(1).

You claim that the rest of the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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<sup>1</sup>Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."

Gov't Code § 552.103(a), (c). The governmental body has the burden of demonstrating that section 552.103 is applicable to the information for which this exception is claimed. Under section 552.103, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated when the written request for information was received and (2) that the requested information is related to the pending or anticipated litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You assert that the city reasonably anticipates litigation over the accident to which the requested information pertains. We note that the first request is contained in a letter from an attorney and that the second requestor identifies himself as the attorney’s legal assistant. The attorney’s letter informs the city that the attorney represents an individual who allegedly was injured in the accident. Under these circumstances, we find that the city reasonably anticipated litigation when these requests for information were received. We also find that the requested information is related to the anticipated litigation. Therefore, except for the incident report that the city must release under section 552.022(a)(1), the requested information may be withheld from disclosure at this time under section 552.103.

In reaching this conclusion, we assume that the opposing party to the anticipated litigation has not already seen or had access to any of the information for which the city claims an exception under section 552.103. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through the discovery process. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party already has seen or had access to information that relates to pending or anticipated litigation, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release the responsive incident report under section 552.022(a)(1) of the Government Code. In releasing the report, the city must withhold Texas driver's license and license plate numbers under section 552.130, except for the information to which the first requestor has a special right of access under section 552.023. The city may withhold the rest of the requested information under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

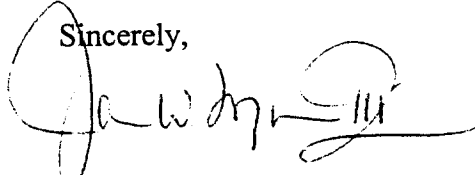
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 150736

Enc: Submitted documents, photographs, and videotape

c: Mr. Vic Feazell  
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